TAKONG TABARI (SUING IN HER PERSONAL CAPACITY AND AS THE ADMINISTRATRIX OF THE ESTATE OF JEFFREY SATUK GABAR-DECEASED)

v.

GOVERNMENT OF SARAWAK & 3 ORS.

HIGH COURT SABAH AND SARAWAK, MIRI
TUAN RICHARD MALANJUM J.
[SUIT NO. MR. 5 OF 1993]
16 NOVEMBER 1994

***EVIDENCE**: Application to order first defendant to produce document for inspection - First defendant claiming privilege - Consideration of ss. 123 & 162 Evidence Act 1950 - Document certified to be an official secret - Whether certificate issued under s. 16A Official Secrets Act 1972 conclusive evidence that the document is an official secret.*

The plaintiff's husband was killed as a result of a explosion and fire in the premises occupied by the fourth defendant. In an action brought by the plaintiff, she sought an order for inspection of a document titled "Department Board of Inquiry Report"(the Report).

The first defendant admitted being in possession of the Report but claimed privilege against its production. The first defendant exhibited a certificate signed by the Director of the Sarawak Public Works Department wherein it was certified that the Report is an official secret as defined under the Official Secrets Act 1972 (OSA 1972) and submitted that by virtue of s. 16A OSA 1972 the certificate issued was conclusive evidence of the Report being an official secret.

The first defendant contended that since the Report is within the category of an official secret as defined under the OSA 1972, it cannot be produced in Court in connection with the action of the plaintiff and that to do so would be an offence under the said Act.

Held:

[1] The issue of admissibility of any piece of evidence in this country comes mainly within the purview of the Evidence Act 1950. There was nothing express or implied that the OSA 1972 should be taken as a statute governing admissibility of evidence. The primary goal of the OSA 1972 is to protect classified documents or information which by such disclosure would be detrimental to the national security or public interest. It was not intended to be used to avoid any liability or to defeat any claim regardless of the culpability of the party relying on it. Accordingly, where a claim for privilege from disclosure of certain documents is made, ss. 123 & 162 of the Evidence Act 1950 should be considered.

[2] Section 16A OSA 1972 is not intended to prohibit the admissibility of a document certified as an official secret. As the said section is only to ouster any action directed to question the reason or ground for the classification of a document as an official secret, it is not *per se* correct to say that once a certificate has been issued certifying that a document is an official secret it is completely excluded from being disclosed in Court.

[3] In the present case all that the first defendant has done is to produce the certificate certifying that the Report is an official secret. Nothing was done to show that the Report related to the "affairs of State" nor was any prejudicial effect on public interest by its disclosure shown. What was done by the first defendant is not sufficient for the purpose of s. 123 of the Evidence Act and accordingly, the Court is entitled to invoke s. 162, in particular sub-section (2) of the Evidence Act 1950 in the present case.

[4] As the affidavit in opposition contains nothing or very minimal material to enable the Court to consider the admissibility of the Report, the first defendant should file a supplementary affidavit within seven days failing which the present application will be allowed.

[Orders accordingly]

Cases referred to:

B.A. Rao & Others v. Sapuran Kaur & Anor [1978] 2 MLJ 146 ***(refd)***

Wix Corporation South East Asia Sdn. Bhd. v Minister for Labour & Manpower [1980] 1 MLJ 224 ***(refd)***

Legislation referred to:

Official Secrets Act 1972, s. 16A

Evidence Act 1950, ss. 123, 162

For the plaintiff - M.S. Sandhu; M/s. Sandhu & Co.

For the 1st defendant - Bernard Philip; Legal Officer, State Attorney-General's Chambers

JUDGMENT

Richard Malanjum J:

In this application the plaintiff is seeking for an order that the defendant (and I take it to be the 1st defendant as the affidavit in support states so) produces for inspection the document namely 'Department Board of Inquiry Report marked "suit" containing findings of the Board, notes of interviews, relevant correspondence and document, photographs and diagrams (hereafter referred to as "the document")' to the plaintiff or her advocates and to permit them to peruse such document and to make copies thereof at such place, time and manner as may be stated in the order applied for.

Briefly, the action of the plaintiff is connected with the explosion and fire on 16 February 1990 in the premises occupied by the 4th defendant whereby her husband suffered severe burns and died as a result.

In its List of Documents dated 29 June 1994 the 1st defendant admitted having the document but has claimed privilege. And in the affidavit in opposition to this application (hereinafter called "the affidavit in opposition") sworn to by Benard @ Bernard ak Philip Lanat, a certificate signed by Datuk Michael Parker, the Director of the Sarawak Public Works Department, was exhibited wherein it was certified that the document is an official secret as defined under the Official Secrets Act 1972 (hereinafter referred to as "the Act"). In short, it is the contention of the 1st defendant that since the document is within the category of an official secret as defined under the Act it cannot be produced in this Court in connection with the action of the plaintiff and that to do so would be an offence under the Act.

Foremost, it must be recognised that the issue of admissibility of any piece of evidence in a Court of law in this country comes mainly within the purview of the Evidence Act 1950. I find nothing expressed or implied that the Act should be taken as a statute governing admissibility of evidence.

In my view the Act deals mainly with the prevention of unauthorised disclosure of official secrets and thus created offences for any such infringement. I do not think it is intended to be used to avoid any liability or to defeat any claim regardless of the culpability of the party relying on it. It is obvious that the primary goal of the Act is to protect classified documents or information which by such disclosure would be detrimental to the national security or public interest.

Accordingly, where a claim for privilege from disclosure of certain documents is made as in this case, ss. 123 and 162 of the Evidence Act 1950 should be considered.

Section 123 reads:

> No one shall be permitted to produce any unpublished official records relating to affairs of States, or to give any evidence derived therefrom, except with the permission of the officer at the head of the department concerned, who shall give or withhold permission as he thinks fit, subject, however, to the control of a Minister in the case of a department of the Federal government, and of the Chief Minister in the case of a department of a State Government.

Section 162 reads:

> (1) A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.
>
> (2) The Court, if it sees fit, may inspect the document unless it refers to affairs of States, or take other evidence to enable it to determine on its admissibility.
>
> (3) .....

In the case of *B.A. Rao & Others v. Sapuran Kaur & Anor* [1978] 2 MLJ 146 his Lordship Raja Azlan Shah F.J. (as he then was) in considering ss. 123 and 162 said this at p. 150 E (right):

> In this country, objection as to production as well as admissibility contemplated in s. 123 and 162 of the Evidence Act is decided by the Court in an enquiry of all available evidence. This is because the Court understands better than all others the process of balancing competing considerations. It has power to call for the documents, examine them, and determine for itself the validity of the claim. Unless the Court is satisfied that there exists a valid basis for assertion of the privilege, the evidence must be produced. This strikes a legitimate balance between the public and private interest. Where there is a danger that disclosure will divulge, say, State secrets in military and international affairs or Cabinet documents, or departmental policy documents, private interest must give way. It is for the Court, not the executive, ultimately to determine that there is a real basis for the claim that "affairs of State is involved", before it permits non-disclosure. While it is clear that the final decision in all circumstances rests with the Court, and that the Court is entitled to look at the evidence before reaching a concluded view, it can be expected that categories of information will develop from time to time. It is for that reason that the legislature has refrained from defining "affairs of State." In my opinion, "affairs of State", like an elephant, is perhaps easier to recognise than to define, and their existence must depend on the particular facts of each case.

Briefly that case was also concerning the notes and findings of the Committee of Enquiry set up in connection with the death of the husband of the plaintiff whilst admitted as a patient of the Bentong and Mentakab District Hospitals. A claim was made for damages due to the alleged negligence of the medical officers of the Hospitals. When a notice to produce all documents in respect of the Committee of Enquiry was served on the defence, objection was made pursuant to s. 123 of the Evidence Act 1950. It was contended, *inter alia*, that any disclosure would be detrimental to public interest and prejudicial to the public service. It was argued that the notes were meant as a guide in the policy making of the Ministry of Health and that the secrecy of such documents was necessary for the proper function of departmental inquiries.

However, the objection of the defence was rejected by the High Court and the then Federal Court. A mere assertion of confidentiality and that affairs of State were involved without evidence to substantiate was not considered to be sufficient to exclude the evidence sought by the plaintiff.

A similar conclusion was also arrived at in the case of *Wix Corporation South East Asia Sdn. Bhd. v Minister for Labour & Manpower* [1980] 1 MLJ 224. But it is to be noted that in both the cases cited above the issue of the documents being "official secret" was not submitted.

And in this case it was contended that as the document had been classified as "official secret" it could not therefore be disclosed. Further, it was also submitted that by virtue of s. 16A of the Act the certificate issued was conclusive evidence of the document being an official secret.

Section 16A reads:

> A certificate by a Minister or a public officer charged with any responsibility in respect of any Ministry, department or any public service or the Menteri Besar or the Chief Minister of a State or by the Principal Officer in charge of the administrative affairs of a State certifying to an official document, information or material that it is an official secret and shall not be questioned in any Court on any ground whatsoever.

My reading of this s. 16A is that it is not intended to prohibit the admissibility in a Court of law of a document certified as an official secret. Rather, it is only to ouster any action directed to question the reason or ground for the classification of a document as an official secret. Thus, it is not *per se* correct to say that once a certificate has been issued certifying that a document is an official secret it is completely excluded from being disclosed in Court. The relevant provisions of the Evidence Act 1950 are there to consider. In other words, classified documents attract the claim of privilege but they are not totally excluded from the applications of the relevant provisions of the Evidence Act 1950 in a Court of law of this country.

In the instant case all the 1st defendant has done was to produce the certificate certifying that the document is an official secret and then relying on s. 16A of the Act. Nothing was shown that the document related to the "affairs of State" nor was it shown of any prejudicial effect on public interest by its disclosure.

In my opinion what was done by the 1st defendant is not sufficient for the purpose of s. 123 of the Evidence Act 1950. Unless of course it can be said that once a document is an official secret it is deemed to be related to affairs of State. But I do not think so. Each case has to be considered on its own particular facts. Accordingly, it is my view that this Court is entitled to invoke s. 162, in particular sub-section (2), of the Evidence Act 1950 in the present case. As the affidavit in opposition contains nothing or very minimal material in order to enable this Court to consider the admissibility of the document, I therefore direct that a supplementary affidavit be filed by the 1st defendant within 7 days from the date hereof for my further consideration failing which this present application will be allowed.